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NO. 68-23

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

GARY SHANHOLTZER and PATRICIA SHANHOLTZER, his wife, Plaintiffs-Appellants, vs. EDWARD McDANIEL, d/b/a MAC REALTY AND INSURANCE, Defendant-Appellee.	Appeal from the Circuit Court of the 19th Judicial Circuit, Lake County, Illinois

PRESIDING JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This is an appeal from the Circuit Court of Lake County. Plaintiffs had filed a small claim action and summons was served upon defendant requiring him to appear on September 18, 1967, at the Magistrate's Court, Branch 1, at 410 Madison Street, Waukegan. On the return date defendant appeared and the case was continued to September 25, 1967. On September 25, 1967, defendant appeared and plaintiffs failed to appear. The case was dismissed. On September 18, 1967, the attorney for plaintiffs had actually appeared at Branch 2 of the Magistrate's Court instead of Branch 1. Since defendant did not appear at Branch 2, the attorney for the plaintiffs made an oral motion for default and default judgment which were granted. On November 13, 1967, the plaintiffs learned of the dismissal entered on September 25, 1967, in Branch 1, and on November 16, 1967, filed their motion to vacate the judgment entered on September 25, 1967. After hearing on November 30, 1967, this petition was denied. It is from the denial of this petition that this appeal has been taken. Plaintiff, within the time prescribed, filed a brief and abstract.

Defendant has filed no brief nor has he appeared before this Court.

As this Court recently held in Nationwide Mutual Insurance Co. v. Paul C. Christakis, 81 Ill. App. 2d 386 (Abst.), it has long been the rule that where the Appellee fails to file a brief as provided by the rules, the Court need not examine the record in detail nor discuss the case at length, but in fact is justified in reversing the decision of the lower court and remanding the case for further proceedings. Cole v. Willhoft, 73 Ill. App. 2d 208 (Abst.) Paulson v. Ades, 71 Ill. App. 2d (Abst.).
464./ In Wieboldt Stores, Inc. v. Mautner, 61 Ill. App. 2d 368 (Abst.) it was held that failure of the Appellee to file a brief as provided by the rules necessitated the reversal of the judgment against Appellant. See also Taylor v. Taylor, 70 Ill. App. 2d 201 (Abst.).

We are of the opinion that the judgment of the court below should be reversed and the case remanded for further proceedings.

JUDGMENT REVERSED AND REMANDED.

Moran, J. and Seidenfeld, J. concur.

51402

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STERLING MATTHEWS, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION. Honorable Richard J. Fitzgerald, Judge Presiding

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Defendant was charged in Count I with having committed indecent liberties, in that he had sexual intercourse with one Deborah Taylor, a child under the age of sixteen years, and was found not guilty on that count at the close of the State's case. Defendant was also charged in Count II with taking indecent liberties with Deborah Taylor, a child under the age of sixteen years, in that he lewdly fondled or touched the child with the intent to arouse the sexual desires of himself or the victim. Defendant was found guilty under Count II and was sentenced to 2 to 4 years in the penitentiary.

Defendant on appeal contends that the State failed to prove him guilty beyond a reasonable doubt and that he did not receive a fair trial.

The complaining witness was born on June 1, 1955, and the acts complained of were allegedly committed on May 22, 1965, when Deborah Taylor, the victim, was very nearly ten years of age.

The victim's mother, Mattierine Bell, testified that on May 22, 1965, the date of the occurrence complained of, she left her home at 12:00 noon, and arrived back between 3 and 4 P. M. At the time she left the defendant and her four children, including the victim, were then home. On May 29, 1965, Deborah Taylor, told her mother what had happened to

her on May 22, 1965.

According to the testimony of Deborah Taylor, she was in the fifth grade in school and lived at 4838 Calumet Avenue, Chicago. She lived there with her mother and brother and sisters, and S.T., whom she identified in court as the defendant. The defendant and the victim's mother had been living together on and off for about four years. He had moved into the house in 1962. He had helped in taking care of the children. There were five rooms in the house and three of them were bedrooms. The three female children, including the victim, Deborah, slept in the first bedroom; a son occupied the second bedroom and the third bedroom was occupied by the victim's mother and the defendant.

The victim's mother testified that on occasions the defendant assisted her in taking care of the children and would baby-sit for her. On occasion he would feed the children but he did not assist her in putting the children to bed, and never bathed the children. The three bedrooms and bathroom were on the second floor and the living room and kitchen were on the first floor. The victim's mother admitted that the defendant was not a boarder in the house. She testified that he was living with her, sharing her bed. The children always called the defendant "S.T."

The four children in the house ranged in age from six years to ten years.

The victim testified that on May 22, 1965, she was at home with her brother and sisters and the defendant. Her mother had gone shopping in the afternoon. After her mother had left the house the victim went to the bathroom and the defendant went with her. He told her to take off her panties and to lie down on the floor. The defendant then turned her and "opened my legs." "Then he put his finger in my booty (indicating the area of the groin). He told me to lay down,

told me to turn my body and touched me." Then he got on top of her and started pumping up and down. He did that for about five minutes. When the victim was asked if she knew what else she did with the booty she answered, "Use the washroom." During this time her brother and sisters were downstairs. The victim testified that the defendant thought he heard her mother coming up and told her to get up and put her panties back on. There was a little blood on her panties.

The victim also testified that the defendant would make her and the other children clean up the house and she did not like to clean up the house. Sometimes she got mad at the defendant, when he told her to clean up the house, and on occasions he had to punish her. She further testified that she did not like to be punished.

When the victim and the defendant went down to the living room the victim's mother had not yet come in. She came in five or six minutes later.

Sidney Wilbon, a police officer, testified that he arrested the defendant and had a conversation with the defendant. Wilbon testified that he found him in a snack bar. The conversation was held in the squad car. The victim and her mother were in the squad car. The victim and her mother were asked to get out of the car and the defendant was taken to the station in the squad car. Police officer Wilbon's partner was with him in the squad car. At that time the defendant denied that he had committed the act charged and said that he only checked out Deborah. Wilbon asked him what he meant by "check out." He said he only felt her because she had been fooling around with other little boys and felt her to see if she did anything.

Police officer John Downey testified that he saw the defendant in the police station and that Detectives Hart and Carlisle were present when he had a conversation with

the defendant. He asked the defendant what he had to say about this matter and the defendant said, "I put my finger into the girl, but I did not have sex relations with her."

It was stipulated at the trial that Dr. Gary Voyce, M. D., if called to testify, would state that on May 29, 1965, he was a licensed physician in the State of Illinois; that on May 29, 1965, around 1:30 A. M. he examined Deborah Taylor, the complaining witness, and observed the following: (a) Fibrotic tags were visible near her hymen and her hymen was not intact; (b) No signs of recent bleeding or ecchymosis were present in the vicinity of her vagina. The examination took place at the Roseland Community Hospital, Chicago, Illinois. It was further stipulated that the doctor would be unable to determine the cause of any tears or tags in the hymen.

The defendant at the trial denied that he ever touched Deborah, and further denied making any of the statements attributed to him.

The defendant contends that the State failed to prove him guilty beyond a reasonable doubt, and cites People v. Nunes, 30 Ill. 2d 143, 146, 195 NE2d 706 wherein it is stated that ". . . indecent liberties is an accusation easily made, hard to be proved, and harder to be defended by the party accused." Defendant also contends that where a conviction rests upon the testimony of the prosecuting witness and the defendant denies the charge, there must be substantial corroboration of the prosecuting witness by some other evidence, fact or circumstance in the case, as a conviction resting upon the testimony of a child of tender years will not be permitted to stand unless the testimony is corroborated or is otherwise strong and convincing. People v. Pazell, 399 Ill. 462, 78 NE2d 212. The defendant argues that the testimony of the complaining witness or victim was uncorroborated. However, in making that contention the defendant

overlooks the testimony by the police officers, one of whom testified that the defendant told him that he had only felt her because she had been fooling around with other little boys and he felt her to see if she did anything. Another officer testified that the defendant stated to him "I put my finger into the girl, but I did not have sex relations with her."

In the cases cited by the defendant in his brief the testimony of the prosecutrix was unsupported, which distinguishes those cases from the instant one, wherein the testimony of the complaining witness is corroborated. While no physical evidence was introduced by the State to corroborate the claim, the complaining witness' testimony together with that of the police officers was sufficient to prove that he had touched the victim. The issue here is whether the defendant touched the complaining witness with intent to arouse or satisfy sexual desires. The medical testimony in this case showed that the victim's hymen was not intact. This testimony would tend to corroborate that of the victim. While the doctor said there was no sign of recent bleeding, the examination was conducted a week after the occurrence. Defendant also argues that if the testimony of the prosecutrix was unbelievable as to the rape it necessarily follows that it was unbelievable as to the charge of fondling or touching. By finding the defendant not guilty of having had sexual intercourse the trial court did not necessarily conclude that the victim's testimony was unbelievable, but that her testimony standing alone was not so clear and convincing as would justify a conviction on that charge.

In People v. Freeman, 244 Ill. 590, 91 NE 708 the defendant was charged with taking improper liberties with an 8-year old girl. In that case the doctor who examined the girl after the occurrence testified that she had gonorrhea, and it was argued that was corroboration as to what the defendant

had done. The defendant, however, testified that he never had gonorrhea and that there was testimony that the defendant had always borne a good character. There was further testimony in that case that the daughter had not always been truthful with the mother. The Supreme Court in the Freeman case concluded that the evidence of the little girl was not clear and convincing, and thereupon reversed the judgment of conviction. However, the testimony of the complaining witness in the instant case was corroborated by the testimony of two police officers as to admissions made by the defendant to the effect that he had put his finger into her and that he had felt her to see if she did anything.

We believe the evidence in this case was sufficient to justify the trial court, whose duty it is to determine the credibility of witnesses and the weight to be accorded their testimony, in finding the defendant guilty.

JUDGMENT AFFIRMED.

DEMPSEY, P.J. and SCHWARTZ, J., concur.